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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6382

WILBERT DAVIS,

Petitioner,

—against—

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT:

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B. The arrest and conviction of the petitioner, a narcotic addict, for possession of heroin and the implements required to maintain his habit, did not violate the constitutional mandate against "cruel and unusual punishment," in the absence of proof that his addiction brought on such a deterioration of the mind so as to fall within the ambit of New York's test for criminal responsibility as found in Section 30.05 of the Penal Law, and where there is a concession that there is no mental illness or

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incapacity within the intendment of that statute. Any further inroad into that statute so as to immunize mere addiction from criminal sanctions would not be legally feasible and would tend to be violative of this State's public policy regarding the safeguarding of the health, safety and morals of its citizens 20

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-6382

WILBERT DAVIS,

Petitioner,

—against—

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Petitioner seeks a writ of certiorari to review an order of the Court of Appeals of the State of New York, entered on December 28, 1973, affirming, without dissent,* an order of the Appellate Term of the Supreme Court of the State of New York for the Second and Eleventh Judicial Districts of the Second Judicial Department, entered on April 26, 1972, which unanimously affirmed judgments of the Criminal

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* Chief Judge Fuld did not participate.

Court of the City of New York, County of Kings, rendered on June 8, 1971, following a nonjury trial convicting petitioner of possession of a dangerous drug in the sixth degree* and criminal possession of a hypodermic instrument,** both misdemeanors, and sentencing him on each charge to a conditional discharge.

Opinions Below

The opinion of the New York Court of Appeals is reported in 33 N Y 2d 221, 306 N.E. 2d 787 (1973), and is set forth in Appendix A of the petition for the writ of certiorari. No written opinion or memorandum was handed down by the Appellate Term of the Supreme Court of the State of New York for the Second and Eleventh Districts of the Second Judicial Department. A copy of the order of affirmance by that court made and entered on April 26, 1972, is part of the petition at Appendix B thereof. The petitioner has also set forth the opinion of Hon. Bruce McM. Wright, a Judge of the Criminal Court of the City of New York, County of Kings, who presided at the trial, at Appendix C.

Jurisdiction

Jurisdiction for the present petition is sought to be invoked under 28 U.S.C., Section 1257(3) and Rule 19(1) of the Rules of this Court. The petitioner contends that the application of criminal sanctions on him, a drug addict, for possession of heroin and the hypodermic instrument used

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* Former Section 220.05 of the New York Penal Law.

** Section 220.45, New York Penal Law.

to administer it, is impermissible cruel and unusual punishment in a constitutional sense (Eighth and Fourteenth Amendments to the Federal Constitution).

Constitutional Provisions Involved

UNITED STATES CONSTITUTION, AMENDMENTS VIII and XIV.

New York Statutory Provisions Involved

Former Section 220.05 of the Penal Law (Criminal possession of a dangerous drug in the sixth degree) read as follows at the time of the petitioner's arrest:

> "A person is guilty of criminal possession of a dangerous drug in the sixth degree when he knowingly and unlawfully possesses a dangerous drug.
>
> Criminal possession of a dangerous drug in the sixth degree is a class A misdemeanor. As amended L. 1969, c. 788, sec. 1, eff. Sept. 1, 1969." Repealed. L. 1973, c. 276, sec. 18, eff. Sept. 1, 1973.

Section 220.45 (Criminally possessing a hypodermic instrument), is set forth as follows:

> "A person is guilty of criminally possessing a hypodermic instrument when he knowingly and unlawfully possesses or sells a hypodermic syringe or hypodermic needle.
>
> Criminally possessing a hypodermic instrument is a class A misdemeanor. L. 1965, c. 1030, eff. Sept. 1, 1967."

Section 65.05 of New York's Penal Law, reads in its pertinent parts as follows:

> "65.05 Sentence of conditional discharge
>
> 1. * * *
>
> 2. * * *

3. Periods of conditional discharge. Unless terminated sooner in accordance with the code of criminal procedure [amended to criminal procedure law by L. of N. Y., 1971, c. 1097, sec. 74, eff. Sept. 1, 1971], the period of conditional discharge shall be as follows:

(a) * * *

(b) One year in the case of a misdemeanor or a violation * * *"

Section 30.05 of the Penal Law of the State of New York governing criminal responsibility by reason of mental disease or defect, reads as follows:

"30.05 Mental disease or defect

1. A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity to know or appreciate either:

(a) the nature and consequence of such conduct; or

(b) that such conduct was wrong.

2. In any prosecution for an offense, lack of criminal responsibility by reason of mental disease or defect, as defined in subdivision one of this section, is a defense. L. 1965, c. 1030, eff. Sept. 1, 1967."

Questions Presented

1. Should this Court depart from the well-recognized doctrine of mootness since petitioner's convictions carry with them no disabilities, and the period during which the sentences of conditional discharge imposed can be revoked under the law of the State of New York (Section 65.05 [3] [b], Penal Law of the State of New York) has now been concluded?

2. Does the imposition of criminal sanctions for the possession of heroin and the instruments by which the drug is administered on a defendant in a case where it is shown that there is narcotic addiction *without more*, and where there is no claim of mental illness or mental incapacity within the intendment of New York's statute regarding criminal responsibility by reason of mental disease or defect, violative of the prohibition against cruel and unusual punishment enunciated by the Eighth Amendment to the Federal Constitution? In short, is the State of New York constitutionally required to formulate a more liberal test of criminal responsibility than is presently extant so that such new test may redound to the benefit of a *mere* addict?

Statement of the Case

The Trial

A. The State's Case

PATROLMAN ANTHONY J. VOGLIO, a New York City Police Officer, testified substantially as follows:

He has been a police officer for two and one-half years, and was at the time of the crimes assigned to the 88th Precinct Tactical Patrol Force (43).* On February 4, 1971, he had been on duty from 6 P.M. until 2 A.M. (43-44). While standing with a brother officer at the corner of Fulton Street and Lafayette Avenue, in the County of Kings, City of New York, he received information that day from

* Numbers in parentheses refer to the pages of the original typewritten minutes of the trial. The trial took place on February 24, March 4 and 10, 1971, and the pages of the transcripts are consecutively numbered. On September 28, 1972, the New York Court of Appeals granted leave to the petitioner to appeal to that court as a poor person on the original record.

a person whom he escorted to 34 Fort Greene Place, in said County, a three-story walkup. The informant, who lived at that address, opened the door of the building for the witness and his brother officer (44-45). The door referred to was the one leading into the building (46). The witness ascended one flight, and as he "turned off the stairway" a bathroom door was ajar about three to four inches. The witness then "turned to . . . [his] right" and saw the petitioner facing a wall, "which would be his left, profile facing me," with a hypodermic needle in his left hand and which needle was against his right forearm (47). The witness then walked into the bathroom, took the hypodermic needle from the petitioner and placed it on the window sill preparatory to searching the petitioner (47-48). The petitioner was arrested and, according to the witness, everything which had been confiscated from the petitioner "was either in his hands at the time or on the window sill; like the bottle cap and the cotton. The stuff was on the window sill" (48). The officer did not then know what was in the hypodermic needle (49).*

On continued direct examination, the witness stated that the petitioner was thereafter taken to the precinct (50), following which time the confiscated items were brought to the laboratory for analysis (51). At this posture, it was stipulated that if Patrolman Yonada Lee, the police chemist, were then present in court, he would testify that the hypodermic needle was functional, that the eyedropper, which was also one of the items seized, con-

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* The validity of the seizure was never placed in issue by the petitioner.

tained one milligram of liquid heroin, while the cotton contained no dangerous drug. Defense counsel then offered the laboratory report as petitioner's Exhibit A (54), at which time the State requested that the contraband also be received in evidence (54-55), which was done, the items being referred to as petitioner's Exhibit B (55). The witness then informed the court that a CR-1 form was filled out following the arrest, and that as a result of his own examination of the petitioner's "physical features," there were fresh needle marks on the right arm (56). According to the arresting officer, the petitioner "pleaded with us that we let him finish taking the shot" (57).

On cross-examination, the witness offered his opinion that the petitioner was an addict (57). The petitioner had admitted to him that he used heroin (58), and that he had been doing so for a period of eighteen months on a daily basis at a cost of $10 a day (59). The witness reiterated that the petitioner pleaded with him for a chance to complete taking his shot since he was going to be in jail for the night. The request was refused (59-60). The police officer had made from ten to fifteen arrests for possession of narcotics and narcotic paraphernalia, and during his studies in the Police Academy he had received training in that subject matter (60). As a police officer, he had seen hundreds of addicts, and could recognize addiction from physical appearances and symptoms (61). As for the petitioner, in addition to the witness noting his appearance, and observing some symptoms, there was the added fact that he was about to inject himself (61-62). The witness concluded his testimony by reiterating that based upon his experience the petitioner was a drug addict (62).

B. The Defense

The State shall adopt the summary of the salient testimony of the various professional witnesses as found in the opinion of the trial judge (Petitioner's Appendix C, pp. C-3 to C-6), as follows:

> "It will be helpful, in considering the defendant's thesis, to summarize the testimony of each witness, insofar as the professional views of each bear upon the issues raised during the trial.
>
> (a) EARLAND CYRUS, M.D.: Dr. Cyrus examined defendant shortly after his arrest and found him, within 'the meaning and purview of § 201 of the Mental Hygiene Law†' to be an addict (68).
>
> (b) BENY JENE PRIMM, M.D.: Dr. Primm, the Program Director of Addiction Research and Treatment Corporation (ARTC), examined defendant following the latter's parole into ARTC's custody (170). The court was deeply impressed with the doctor's wide-ranging knowledge of one of our most vexatious dilemmas. His credentials reflected a pioneering engagement of addiction as a persistent bane of our society (163-170.) He stated 'With certitude and unequivocally' that defendant was a narcotic addict (175-176.)
>
> He agreed with a World Health Organization definition of heroin addiction and dependence as 'An overpowering desire or need to continue taking the drug and to obtain it by any means,' because of 'Such overwhelming involvement . . . that the use [of] narcotics is the central feature' of the addict's life, creating both a psychic and physical dependence upon the drug (178). In his own incisive words, Dr. Primm described defendant's craving for heroin as a 'compulsive psychological' drive, and one which

is 'patho-psychological' (180), undeterred by the dread possibilities or the chance for fatal consequences (181-182.)

After saying that the prison process has no healing effect whatsoever in abating addiction, Dr. Primm added that an addict 'is indeed not a criminal, but a very sick person' (187), whose insatiable hunger for his opiate thrives upon the myth of 'addict culturedom' that the worst tragedy in life is an abrupt deprivation of drugs. 'Therefore, the degree of compulsion is further increased from the fear of this myth' (189.)

There can be little doubt that addiction is a disease, or that the malady has grown to epidemic proportions in recent years. Neither can it be doubted that jails provide neither the medicine nor the long-term chemo-therapy necessary to retard the avid hunger of an addict for his anesthatized [*sic*] reality.

(c) ALBERTO AVELARES: Mr. Avaleres, an extraordinary example of a former addict, self-shorn of his narcotic burden, testified in a most moving and poignant way to his life along our mean streets, his wasted youth as a sometime tenant of various prisons and the fierce and rampant drive of his early and persistent addiction. During the twenty years he was an addict, he was arrested so many times that he 'lost track.' His convictions numbered three for felonies and six or seven for misdemeanors (143.)

His habit required twenty bags of heroin a day†† (144), he said, as he offered testimony to buttress the defendant's argument that addiction is a sickness depriving its victims of all power to reason between right and wrong, leaving them to be help-

lessly compelled and driven solely for the appeasement of their addictive lust.

Addiction, he said, 'is the totality; that's the whole thing. Everything else revolves around the addiction; life and death' (160), and the addict is an 'Emotionally immature' waif at the perilous whim of a 'type of lunacy' (160). Mr. Avaleres noted that his brother had been an addict. When the brother was arrested, leaving a wife behind, Mr. Avaleres prostituted the wife to raise money for drugs (260.) He did not accept the premise that addicts really 'know what they are doing or feeling or anything like that' (263.)

Prisons, he said, were of no avail to an addict and acted only as a seed-bed for future crimes. During a two and one-half year period at Rikers Island, he learned from other prisoners 'pushing and using more drugs, on the heavier basis' (251). Imprisonment was an opportunity to 'tighten up' one's connections and lay the basis for future purchases of contraband (252.) Acting as preceptors for artful dodging, imprisoned addicts schemed to refine such underworld wisdoms as 'how to commit burglaries;' where to dispose of stolen property; the kinds of lawyers to retain and precisely what and how much to tell them and what not to say; what to steal and what neighborhoods to steal it from and the strategy for breaking and entering a home and how to purchase drugs at the best price (267-269.)

This melancholy narrative revealed that our prisons are virtual learning academies for the underworld, where close attendance is compulsory. It speaks eloquently to the point of bare imprisonment, also, as opposed to any effort at rehabilitation or, in the case of an addict, a cure for his affliction.

(d) WILLIAM J. VANDEN HEUVEL: Mr. Vanden Heuvel, Chairman of the Board of Correction of the City of New York, uttered many hard sayings which may be summarized as an assertion that the City's jails are not the place for narcotic addicts. Nevertheless, between 50% and 70% of the prison population have had some narcotic involvement (277-278.) Between October, 1970 and March, 1971, there were nine deaths in City detention centers, seven of which were suicides. All had 'a common denominator of narcotics' leading to their detainer. No prison facility was adequate to treat the arrested addict (279, 281-282, 296.)

Addicts, it was stated, are not competent to understand or deal with their confrontation with criminal justice (285-286). Apparently produced in support of the defendant's thesis that, as an addict, charged with possessing narcotics for his own use, his Constitutional rights are violated by the charges themselves, accompanied by their burden of the criminal process. He quoted Dr. Vincent Dole as saying that addicts, deprived of drugs and in a state of withdrawal from their influence, are not competent to participate in the complex steps of criminal arrest, arraignment, hearing and trial and certainly not imprisonment (285.)*

† Article 9, Mental Hygiene Law deals with drug addiction in New York. Perhaps its boldest and only genuine success has been to reorganize in its text that narcotic addiction is a 'disease' (§ 200). It creates a Commission for the compulsory treatment of the malady and for the rehabilitation of addicts. Either from lack of money and space or a simple

* (Footnote not in original.) Dr. Vincent P. Dole was conceded to be an expert in addiction and has been a leader in the formulation of the Methadone Program (385).

> inability to recognize the epidemic proportions of drug addiction, the Narcotic Addiction Control Commission has been a failure in meeting the noble ends it was enacted to achieve.
>
> †† Compare this with defendants' maximum use of four bags each day, although defendant's use was for a period of only two and one-half years (96, 98.)"

The State will accept the petitioner's additional statement of facts, which also includes his testimony as a witness in his own behalf (Petition, pp. 3-8).

The gist of the testimony of all of the defense witnesses does not affect the gravamen of the charges lodged against the petitioner, and is concerned solely with the nature of narcotic addiction, the plight of the addict, and the fact that the petitioner was a narcotic addict who underwent peculiar problems and experiences, social and medical, because of his condition. Some testimony was also generally adduced to the effect that a person in the process of withdrawal from heroin, or other heavy drug use, is not competent to cope with the problems of confrontation with the processes of criminal justice. The aim of defense counsel in presenting his witnesses was to fortify the position that the initiation of criminal charges against the petitioner for possesson of heroin and a hypodermic instrument, for his own use, violated his constitutional rights.*

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* There is no claim that the petitioner was charged with the commission of a crime *while under the influence of drugs* so as to affect his intention in the commission of such crime. Compare *United States* v. *Romano*, 482 F.2d 1183, 1196 (5th Cir. 1973).

References shall be made to the particular testimony of some of the witnesses for the defense, as well as to the petitioner himself, as the State may deem appropriate in seeking the denial of the writ of certiorari sought herein.

Summary of Argument

Firstly, it is the respectful submission of the State of New York that the doctrine of mootness is still of sufficient legal vitality to warrant its application herein. This Court has long enunciated this doctrine wherein no attempt will be made to review an appeal on the merits without a showing of factors which are of sufficient vigor to move the Court from this traditional rule. Thus, it is contended by the State of New York that there do not exist any considerations to veer this Court from applying the doctrine of mootness. See *Jacobs* v. *New York*, 388 U.S. 431, 87 S. Ct. 2098 (1967), and *Tannenbaum* v. *New York*, 388 U.S. 439, 87 S. Ct. 2107 (1967), *rehearing denied*, 389 U.S. 892 (1967), wherein the doctrine was applied by the majority of this Court.

Secondly, no Federal question, constitutional or otherwise, exists. New York as a sovereign State is constitutionally empowered to enact a reasonable statute such as Section 30.05 of the Penal Law (Mental disease or defect), *supra*, which presently serves as the sole and legally sound criterion for determining criminal responsibility. Criminal sanctions thereby imposed upon a mere addict for the possession of illicit heroin to feed his habit, and the instruments by which the drug is administered, cannot logically and rightfully bring into play any contention that such person has been subjected to cruel and unusual punishment.

Without any showing that the petitioner's addiction has brought on an impairment of the mind so severe as to be equivalent to insanity and thus within the ambit of Section 30.05 of New York's Penal Law, as the petitioner concedes in his petition (Petition, p. 12), and as he has done in the court below, it cannot be justifiably urged that the State of New York is constitutionally impeded from applying the criminal law to the conduct for which he was arrested and convicted. Any other conclusion would act to the detriment of this State's legitimate public policy interest of preserving the health, safety and morals of its citizens within its borders. It is respectfully contended that it is this public policy which mandates the determination that no rights and privileges of the petitioner under the Eighth and Fourteenth Amendments to the United States Constitution have been violated by the imposition of criminal sanctions upon him, a mere addict, for what he terms an "uncontrollable" compulsion—which the facts of the case actually belie—to possess heroin and the implements by which the drug is administered.

ARGUMENT

A.

The petition for the writ of certiorari should be dismissed since the case is moot.

It is the respectful submission of the respondent herein that since the sentences imposed upon the petitioner on *June 8, 1971* for the misdemeanors committed by him were conditional discharges, and the said convictions carry no

disabilities such as loss of civil rights, the doctrine of mootness can properly be applied after the period during which such sentences can be revoked which, in the State of New York, is one year from the date of each of such original sentences during which time the petitioner could have been sentenced either under Section 208 of the former New York Mental Hygiene Law, or under Section 70.15 of New York's Penal Law if, at the time of recall, the petitioner was no longer an addict. See Section 65.05(3)(b), New York Penal Law, *supra*. Neither New York law nor federal law imposes any further penalty for conviction of the misdemeanors involved in this petition. Consequently, the State of New York is constrained to rely on the authority of the majority holdings in *Jacobs* v. *New York*, 388 U.S. 431, 87 S. Ct. 2098 (1967), *supra*, and *Tannenbaum* v. *New York*, 388 U.S. 439, 87 S. Ct. 2107 (1967), *rehearing denied*, 389 U.S. 892 (1967), *supra*.

There is no pecuniary interest in the outcome of any appeal in this Court for there is nothing which can be claimed to be the subject of forfeiture. To reiterate, there is also no loss of civil rights. Compare *Fiswick* v. *United States*, 329 U.S. 211, 67 S. Ct. 224 (1946); *United States* v. *Morgan*, 346 U.S. 502, 74 S. Ct. 247 (1954).

In *St. Pierre* v. *United States*, 319 U.S. 41, 63 S. Ct. 910 (1943), this Court stated:

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of litigants in the case before it. [Citations omitted.]" (*Id.* at 42, 63 S. Ct. at 911.)

It is significant that in *St. Pierre, supra,* it was also advanced:

> "Petitioner also suggests that the judgment may impair his credibility as a witness in a future legal proceeding. But the moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review." (*Id.* at 43, 63 S. Ct. at 911-12.)

Unlike the appellant in *Parker* v. *Ellis,* 362 U.S. 574, 80 S. Ct. 909 (1960), the petitioner herein was represented by counsel at all stages of the proceedings.

Since the petitioner was convicted of two *misdemeanors* (Section 220.05 of the New York Penal Law [now repealed],* and Section 220.45 of the New York Law, *supra*), we are not here concerned with such recividist sentencing provisions as found in Section 70.06 of New York's Penal Law, which authorizes an indeterminate sentence of imprisonment for a second *felony* offender, or in Section 70.10 of New York's Penal Law, which provides for particular treatment for a persistent *felony* offender. There is no doubt that *if* the petitioner had been convicted of a felony, *instead of the present misdemeanors* for which convictions he now seeks review by this Court on the basis of purported infringement of his rights under the Eighth and Fourteenth Amendments to the Federal Constitution, the existence of such recidivist sentencing statutes as hereinabove referred to, which have been held not to be *ex post facto* in nature (*Spencer* v. *Texas,* 385 U.S. 554, 559-60, 87 S. Ct. 648, 651 [1967]), might justifiably give rise to the contention that the petitioner would encounter collateral

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* N.Y. Sess. Laws of 1973, c. 276, sec. 18, eff. Sept. 1, 1973.

disabilities at a later date should he be found guilty of committing a subsequent felony within the time period provided for in the applicable statute (see, *e.g.*, Section 70.06 of New York's Penal Law, *supra*, subdivisions [ii], [iv] and [v]). Fortunately, however, for the petitioner, there is nothing in New York's statutory law which will enable any court to apply his misdemeanor convictions herein as similar predicates for enhancing or stiffening the sentence imposed for the commission of a later crime.

Chapter 276, Section 19, of the New York Session Laws of 1973, effective September 1, 1973, which, when read together with Section 18, now comprises Article 220, Controlled Substances Offenses, provides for the *elevating of the grades* of various crimes within said Article 220 if there exists a prior conviction for a drug-related offense. However, it is the State's respectful submission that the rules of statutory construction appear to militate against any holding that the present statutes encompassed within the newly enacted Article 220, providing for the raising of the grade of a drug-related crime committed after September 1, 1973 and followed by conviction,* are intended to apply to any of the charges, the convictions for which, now the subjects of this petition, took place *prior* to that effective date. And there is strong reason to believe, since not expressly found in new Article 220, and in the light of the doubt as hereinafter demonstrated, that such might well be the construction made by this State's highest tribunal should such issue be squarely presented before it at any time in the future, notwithstanding the policy of severity attached to New York's present drug laws related

* See present Sections 220.12, 220.16(2), 220.34(2), 220.37(2), 220.39(2), and 220.55 of New York's Penal Law.

to the sale, possession, and use of narcotics and other dangerous drugs, a legislative policy which an appellate court might not consider frustrated if an *in futuro* construction were to be adopted.

A leading authority on the new drug laws of New York has highlighted the problems inherent in determining whether drug-related convictions prior to September 1, 1973 can be deemed predicates for subsequent convictions for "raised-grade" crimes under present Article 220.* It is such problems indeed which make significant the principle of law so cogently set forth by this Court in *United States Fidelity Co.* v. *Struthers Wells Co.*, 209 U.S. 306, 28 S. Ct. 537 (1908), wherein it was stated:

> "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied. [Citations omitted.]" (*Id.* at 314, 28 S. Ct. at 539.)

This principle of law has been consistently adhered to by this State's highest tribunal since as early as the case of *The New York and Oswego Midland Railroad Company* v.

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* ROSENBLATT, *New York's New Drug Laws and Sentencing Statutes*, 1973, Law Journal Press, N.Y. See Appendix A, *infra*, for excerpts, and comments by the author of this brief.

Van Horn, 57 N.Y. 473, 477 (1874), and as recently as *Gleason* v. *Gleason*, 26 N Y 2d 28, 36, 256 N.E. 2d 513, 516-17 (1970). In *Gleason*, the New York Court of Appeals, albeit applying this rule of law, had no other alternative than to apply retroactivity to the statute therein reviewed because the legislative purpose to do so had been "unequivocally established" by an "unmistakable demonstration" (26 N Y 2d, *supra* at 36, 256 N.E. 2d at 517).* But that does not appear to be so with regard to whether the petitioner's present convictions can serve as predicates for elevating the degree of any crime under Article 220 for which he may hereafter be arrested and convicted. Of course, there is no present case law on the subject so that the issue is not definitive. As pointed out by the author of this brief in his comments in Appendix A, *infra*, considerable doubt exists as to whether a retroactive application would be legally sound with reference to the applicable sections found within New York's Article 220 of the Penal Law, as presently constituted. Such confusion might well inure to the petitioner's benefit in the future should such issue arise.

See, also, McKinney's Consolidated Laws of New York Annotated, Book 1, Statutes, Section 51(b), and cases therein cited.

In view of the foregoing, therefore, since all of the language of the pertinent sections within Article 220 of New York's Penal Law may be satisfied by giving it prospective

* And so is it "unequivocably established" by the verbiage and rationale of the recidivist sentencing statutes, Sections 70.06 and 70.10, *supra*, of New York's Penal Law, none of which statutes the petitioner need be concerned with because of his present two *misdemeanor* convictions.

operation, so that the petitioner herein might not seriously fear any collateral disabilities in the future by reason of the present two misdemeanor convictions incurred prior to September 1, 1973, it is respectfully urged that notwithstanding the contrary position taken by then Mr. Chief Justice WARREN in his dissenting opinion in *Jacobs* v. *New York*, 388 U.S. 431, 434, 87 S. Ct. 2098, 2100 (1967), *supra*, this Court would not be "straining the mootness doctrine" if the said doctrine were to be applied to the instant petition, a doctrine which the State of New York must advance at this time.

B.

The arrest and conviction of the petitioner, a narcotic addict, for possession of heroin and the implements required to maintain his habit, did not violate the constitutional mandate against "cruel and unusual punishment," in the absence of proof that his addiction brought on such a deterioration of the mind so as to fall within the ambit of New York's test for criminal responsibility as found in Section 30.05 of the Penal Law, and where there is a concession that there is no mental illness or incapacity within the intendment of that statute. Any further inroad into that statute so as to immunize mere addiction from criminal sanctions would not be legally feasible and would tend to be violative of this State's public policy regarding the safeguarding of the health, safety and morals of its citizens.

A further reason for not granting this writ is based upon the sovereign right of the State of New York to enact legislation which it is constitutionally empowered to do which will be in harmony with its public policy. This Court

has held that "it is for the lawmakers to determine the state's public policy" *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U.S. 353, 357, 51 S. Ct. 476, 478 (1930). The statute governing criminal responsibility now in effect in New York is both fair and wise in scope, and without any constitutional infirmity.

The petitioner attempts to eschew and obfuscate the provisions of Section 30.05 of New York's Penal Law, *supra*, the sole test within that jurisdiction for judging criminal responsibility, by suggesting that the "trial court found against petitioner on the erroneous assumption that petitioner had not demonstrated mental incapacity within the penal law's allowance for the insanity defense" (Petition, p. 12). Yet, notwithstanding such contention, petitioner relies on the very language of Judge Jasen of the New York Court of Appeals, who, in speaking for the court below, definitively refers to the "far-reaching ramifications for common-law doctrines of criminal accountability" (Petition, p. 9), thus, in effect, approving the trial Judge's approach in constituting Section 30.05 as the proper guideline for assessing criminal responsibility for the commission of the proscribed acts herein within the State of New York.

When we analyze the World Health Organization's definition of addiction relied upon the petitioner (Petition, n. 6 at p. 6), the mental attitude displayed by an addict plays substantially the same vital role as do the thought processes related to the volition of those beset by other mental aberrations and, who, upon the commission of their own interdicted acts, are required to be judged by the standards of this salutary and reasonable provision of the law. Thus, a holding that mere addiction is sufficient to justify free-

dom from criminal sanctions for the possession of heroin and the implements required to maintain the habit, as petitioner contends, would virtually license an addict "to commit any criminal act—including the sale of drugs—that he considers necessary to support and maintain his habit" (*United States* v. *Moore*, 486 F. 2d 1139, 1208 [D.C. Cir. 1973], *cert. denied*, U.S. , 94 S. Ct. 298 [1973]; Robb, Cir. J.). There would be those who would soon endorse the view that "*the more desperate bar'- robber for drug money has even a more demonstrable lack of free will and derived from precisely the same factors as appellant argues should excuse the mere possessor*" (486 F. 2d, *supra* at 1146; emphasis in original; Wilkey, Cir. J., affirming the convictions and sentences). Even the supplier of the narcotics would soon find comfort by rationalizing his conduct as humane (see *id.* at 1147; Wilkey, Cir. J.). To the same effect, see Judge Jasen in the opinion below (Petition, Appendix A, pp. A-7, A-8).

If a mere narcotic addict is to be permitted to possess and use drugs, how shall we determine how much he shall have and use at any one time in order to satisfy his personal habit? And who can say with reasonable certainty that a particular addict in possession of narcotics will not syphon off a portion of it for the purpose of selling it? It was recognized in *United States* v. *Ashton*, 317 F. Supp. 860, 862 (U.S.D.C. D.C. 1970) that "[i]t is a matter of common knowledge that most addicts sell narcotics from time to time to finance their habit, or trade heroin for the favor of food or lodging, or give drugs to friends facing withdrawal." Indeed, one of the petitioner's defense witnesses himself pushed drugs while he was taking them (253). Then again, who will judge whether the heroin possessed

by an addict is of a purity more than adequate for his intake? In other words, is the heroin in the possession of the addict of a quality stronger than he actually needs so that he would be able to prepare additional heroin for sale in the open market? Law enforcement would be relegated, in a large measure, to determining whether persons possessing narcotics were, first, drug addicts, and second, whether the narcotics found on the alleged drug addict was in an amount not exceeding the required amount for his own habit. Problems like these would appear capable only of being solved by the State of New York by opening up facilities with specially trained personnel, and at great expense to the public, in order to make such determinations. In time, the State of New York would indeed be administering to a "sick society." Public interest and progress would be made subservient to such procedures. In short, such alternatives would be unthinkable and would lead to the next step of assisting other persons with psychopathic personalities, such as rapists, kleptomaniacs, pyromaniacs, with the outlets which they require to satisfy their own particular urges.* The matter, thus, reaches the posture of an argument *reductio ad absurdum.*

The World Health Organization's definition of heroin dependence (Petition, n. 6 on p. 6) includes as one of the characteristics of such dependence "[a]n overpowering desire or need to continue taking the drug and to obtain it *by any means*" (emphasis supplied). Before one should be

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* As a matter of fact, most of these unfortunate persons are less responsible for their "afflictions" than those who embark on the drug habit in a free and willing manner. The petitioner is not a person whose addiction was incurred in his mother's womb. His addiction was brought on by "reasoned choice."

able to be absolved from criminal responsibility for possession of heroin and implements because of his addiction and to assure the citizen that he will not be victimized by a narcotic addict while on the quest of obtaining a "fix" *by any means*, which certainly encompasses resort to crime, violent or otherwise,* some thought should be given to the sound statement by then Circuit Judge Burger, now Chief Justice of this Court, in *Castle* v. *United States*, 347 F.2d 492, 494 (D.C. Cir. 1964), *cert. denied*, 381 U.S. 929, 953 (1965), that "the core of the problem . . . is not one of labels whether 'disease' or 'addiction' but whether an abnormal condition of the mind has substantially impaired the accused's capacity to control his behavior."** And this "abnormal condition," it is respectfully urged, must reach the level required by Section 30.05 of the New York Penal Law, *supra.*

It appears that defense counsel has misdirected his sympathies by implying that the needs of a drug addict are stronger than those of the other psychopathic personalities hereinabove referred to. To forgive the narcotic addict for

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* "Narcotic addicts are estimated to be responsible for one-half the crimes committed in the city of New York alone and the problem of narcotic addiction is rapidly spreading into the suburbs and other parts of the state. This threat to the peace and safety of the inhabitants of the state must be met. Not only crime, but unemployment, poverty, loss of human dignity and of the ability to fill a meaningful and productive role in the community, as well as damage to the physical and mental health of the addict himself are all by-products of this spreading disease" (Section 200, former New York Mental Hygiene Law, Declaration of purpose; now Section 81.01, Revised Mental Hygiene Law, L. 1972, c. 251, eff. Jan. 1, 1973).

** In *Castle*, the same Report of the World Health Organization referred to as Technical Report No. 21, p. 6 (1950), was before the court.

the commission of crimes prompted by the need for narcotics, particularly the possession of narcotic contraband, is not as legalistic an approach as the impelling need to protect society, particularly the actual victims, from those who will be required to engage in crime because of narcotic addiction. Just as overwhelming hunger does not justify homicide and cannibalism even to avoid certain starvation (see *Queen* v. *Dudley & Stevens*, 14 Q.B. 273), so does not the overwhelming hunger for narcotics, even *if* that be the case with the instant petitioner. Neither do the urges per se of the rapist, nor those of the pyromaniac, or of the kleptomaniac, result in absolution in the eyes of our Penal Law. More is required. See LEVIN, COMPULSION, which deals with the "irresistible impulse" argument so eloquently pursued by Clarence Darrow in his famous defense of the brilliant, but unfortunate youths, Loeb and Leopold. See, also, CONRAD, MR. SEWARD FOR THE DEFENSE.

Surely, it would not be expedient in the light of present-day medical knowledge to adopt any rule for drug addiction without more which would be patterned on what is already scientifically known and accepted by medical authorities in the field of mental diseases. It is respectfully urged that appellations such as "irresistible urge," "irresistible compulsion," "irresistible impulse," "irresistible drive," "uncontrollable craving," "morbid propensity," and a host of other strong and forbidding descriptions suggesting some form of monomania or insanity, be carefully scrutinized when applied to a drug addict who, as the present record shows, is one whose actions were knowing, intelligent, deliberate, and coherent. And, as the trial judge stated below, that "[w]hile compulsion there may have been, it was not so

virulently overriding as to demolish all caution and care in the use of the drug" (Petition Appendix, p. C-10).

The availability of a drug-dependence defense for mere addiction has not been recognized in various federal jurisdictions. Drug addiction must be of such significance that the trier of the facts must determine whether at the time of the crime a defendant had a mental disability and, if such disability is determined to have existed, whether his act was the product of that infirmity. See *Lloyd* v. *United States*, 343 F. 2d 242 (D.C. Cir. 1964), *cert. denied*, 381 U.S. 952 (1965); *Castle* v. *United States*, 347 F. 2d, *supra* at 495; *Heard* v. *United States*, 348 F. 2d 43, 44 (D.C. Cir. 1965); *United States* v. *Freeman*, 357 F. 2d 606, 625 (2d Cir. 1966); *Bailey* v. *United States*, 386 F. 2d 1 (5th Cir. 1967); *Gaskins* v. *United States*, 410 F. 2d 987, 989 (D.C. Cir. 1967); and *Smith* v. *Follette*, 445 F. 2d 955, 961 (2d Cir. 1971).* In *Lloyd, Castle, Bailey, and Smith, supra*, the defendants were charged with crimes of a narcotic context and at trial set up defenses of mental incapacity because of drug addiction. In *Bailey, supra*, the defendant had contended that since he was addicted to narcotics and had been unable to cure his addiction, he was not able to resist the daily use of heroin, adding further that his addiction was in the nature of a disease which brought about a compulsion to procure and use narcotics and because of such compulsion, he could not be held criminally responsible. In dismissing the contention, after stating that " 'a mere showing of

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* It was in *United States ex rel. Kyle* v. *Mancusi*, a companion case to *Smith* v. *Follette*, that the defendant, a narcotic addict, was convicted of the crime of criminal possession of a dangerous drug; the defendant in the *Smith* case, also a narcotic addict, was charged with the sale of marijuana.

narcotics addiction, without more, does not constitute "some evidence" of mental disease or insanity so as to raise the issue of criminal responsibility [citations omitted]' " (386 F.2d, *supra* at 4), the court went on to say that "the record contains no evidence probative of the contention that addiction eliminates the criminal intent of a narcotics offender. It would appear that an element of reasoned choice yet exists when an addict knowingly violates the law in acquiring and using drugs [footnote omitted]. One is not excused for offending simply because he wanted to very, very badly [footnote omitted]." (*Ibid.*)* It is interesting to note that a similar theory has been applied to chronic alcoholism where it has been held that that condition is not per se sufficient to raise the criminal responsibility issue (see *Salzman* v. *United States*, 405 F. 2d 358 [D.C. Cir. 1968]).

Although Section 30.05 of the New York Penal Law makes broader and more liberal the M'Naghten Rules or test enunciated in the famous M'Naghten Case** (Rules which have long been considered outmoded by eminent jurists***), by substituting "substantial capacity" for "total impairment," the totality of the evidence in the instant case, as will be

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* Some State cases rejecting such a defense are *People* v. *Perez*, 41 A D 2d 903 (2d Dept., N.Y. 1973); *People* v. *Nettles*, 34 Ill. 2d 52, 213 N.E. 2d 536 (1966), *cert. denied*, 386 U.S. 1008 (1967); *People* v. *Luckey*, 90 Ill. App. 2d 325, 234 N.E. 2d 26 (1967); *People* v. *Jackson (Henry, Jr.)*, 40 Ill. 2d 143, 238 N.E. 2d 383 (1968); *People* v. *Jackson (Samuel Lee)*, 253 N.E. 2d 527 (1969); and, *Nutter* v. *State*, 8 Md. App. 635, 262 A. 2d 80 (1970). Compare *People* v. *Myers*, 39 A D 2d 122 (2d Dept., N.Y. 1972).

See, also, *United States* v. *Williams*, 8 CrL 2460 (March 4, 1971) (D.C. Super Ct.); *Wheeler* v. *United States*, 276 A. 2d 722 (D.C. Ct. App. 1971).

** 10 Clark and Fin. 200, 210 (1843).

*** See *United States* v. *Freeman*, 357 F. 2d 606 (2d Cir. 1966), *supra* at 619 and nn. 41 & 42.

hereinafter demonstrated, nevertheless precludes any application of the statute so as to accrue to the petitioner's benefit. Nowhere in New York's statutory scheme, or in the case law of this State, is there any recognition that drug addiction *alone* (in a drug-related criminal act which victimizes another, or in a criminal act inherent in the addiction, as is possession of a dangerous narcotic drug and the paraphernalia employed to administer it) is sufficient to bring into operation the provisions of Section 30.05 of the New York Penal Law, *supra*, so as to constitute a defense to a prosecution. Albeit the New York State Legislature has made reference to drug addiction as a "disease," and has characterized a drug addict as a sick person who requires treatment,* it is no doubt because there was, and continues to be, a strong societal desire to accord to drug-oriented criminality a humanitarian attitude so that a rehabilitory approach can be encouraged rather than one that is exclusively punitive. However, this humanitarian attitude is not intended to eschew the doctrine of subjecting the drug-addicted offender to the criminal processes of the law, but, rather, to implement those processes with whatever programs may then be available by which the narcotic addict may be assisted in alleviating his drug problem so that he can avoid future conflicts with the criminal law, conflicts which are ofttimes stimulated by his addition.

Any expansion of the present New York legislative view of criminal responsibility as found in Section 30.05, which

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* See Section 200(1), (2), of the former New York Mental Hygiene Law, in effect at the time of petitioner's trial, and renumbered Section 81.01(a) of the Revised Mental Hygiene Law. The newly enacted Section 81.01(b) refers to drug dependence as "this spreading disease" (N.Y. Sess. Laws 1973, c. 676). See, also, *People* v. *Fuller*, 24 N Y 2d 292, 301, 248 N.E. 2d 17, 20 (1969).

would have been brought about by New York's highest tribunal, simply because a person is a narcotic addict, without more, would have been an unwarranted usurpation of the legislative function. As was significantly stated by then Judge Cardozo (later an Associate Justice of this Court) in *Sexauer & Lemke* v. *Luke A. Burke & Sons Company*, 228 N.Y. 341, 345, 127 N.E. 329, 331 (1920), "Freedom to construe is not freedom to amend." In *United States* v. *Moore*, 486 F. 2d 1139 (D.C. Cir. 1973), *supra*, a case which bears strongly on the very same issue before this Court,* Circuit Court Judge Wilkey had this to say about a court's power to legislate:

> "Just as Justice Black turned away from the proposed constitutional rule, we spurn the proposed 'common law' rule, not only because the recently created statutory scheme of dealing with narcotics addicts stands a reasonable chance of reaching the objectives of 'deterrence, isolation, and treatment,' but also because the particular nature of the problem of the heroin traffic makes certain policies necessary that should not be weakened by the creation of this defense. There is no compelling policy requiring us to intervene here [footnote omitted].
>
> "Furthermore, if such a judgment weighing and balancing conflicting public interests and policies

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* Although in the *Moore* case, unlike the instant appeal, the evidence indicated that the defendant "was not a mere non-trafficking addict but was in fact engaged in the drug trade (*id.* at 1144 & n. 6). See, also, *id.* at 1206. Notwithstanding this, however, Circuit Judge Wilkey stated, "Yet even if we were to assume that appellant was a simple addict and nothing more, we believe that his conviction must be sustained" (*id.* at 1144). The majority was not willing to create an "addiction defense" to a charge involving the possession of narcotics.

is to be made, it should be made by Congress, which, as we explore more fully *infra*, has by its activity in this area demonstrated both that it possesses more adequate facilities to deal with the problems of narcotic addiction, and that we in the judiciary are somewhat circumscribed in our activity in this area [footnote omitted]. [*Id.* at 1147-48.]

* * * * *

"The problem with our making the choice that appellant urges is that, unlike common law judges who were perhaps the major legal policy-making body before the rise of the parliamentary system as we know it today, this court is not the appropriate body to make such a policy judgment. Congress is now the best forum with resources adequate to determine the implications of such a policy, to evaluate the social, scientific, and psychological premises underlying such a policy, to make the appropriate rules, and to establish the necessary mechanisms (including the funding) to carry them out. [*Id.* at 1154.]

* * * * *

"[W]hile Congress has not explicitly provided that addiction shall *not* be an affirmative defense to a charge of possessing illicit narcotics, the congressional intent to prosecute drug users expressed in D.C. Code § 24-601, buttressed by Congress' legislative activity both before and after that expression of legislative intent, demonstrates that *Congress has preempted this court's authority to create a common law defense.* It is hornbook law that when the legislature has spoken, what might have been the common law is altered, and judges (including this court) may not change the law back because they would have favored a different policy, unless there is a constitutional mandate, which, of course, would

operate irrespective of judicial preferences. [*Id.* at 1156; emphasis in original.]

* * * * *

"Congress has not ceased to attempt to fashion new ways to deal with these problems of narcotics addiction; [footnote omitted] hence, on the shaky foundations—constitutional, precedential, interpretative—advanced by appellant, it would be unthinkable to write our own new law that might undercut some of these congressional efforts [footnote omitted]. We are supported in our conclusion by Judge Leventhal's eloquent and exhaustive analysis of Congress' intent in passing the various enactments discussed above and the consequent need for judicial restraint. [*Id.* at 1158-59.]

"Our reluctance to make new law is not, as Judge Wright appears to suggest, 'to shut our eyes in ignorance and allow injustice to persist in blind imitation of the past' [footnote omitted]. Our course of action is simply to leave the innovations in this area to a body more capable of making decisions on them than are we. The extremely difficult and complex questions involved in the problems of rehabilitation of addicts and elimination of the illicit drug traffic are best solved by the kind of extended debate and investigation possible in the legislature. Judicial modesty and restraint may not make the headlines, but they have their place." (*Id.* at 1159.)

Petitioner lays great stress (Petition, p. 9) upon the statement of Mr. Justice WHITE, who, in affirming the conviction of a chronic alcoholic for public intoxication in *Powell* v. *Texas*, 392 U.S. 514, 88 S. Ct. 2145 (1968), stated:

"If it cannot be a crime to have an *irresistible compulsion* to use narcotics, *Robinson* v. *California*

> . . . , I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an *irresistible urge* to consume alcohol should not be punishable for drinking or for being drunk." (392 U.S., *supra* at 548-49; 88 S. Ct. at 2162; emphasis supplied.)

It is important to note that Mr. Justice WHITE refers to the terminology of "irresistible urge,"* and by prefacing the last sentence of the quoted material with the word "[s]imilarly," it becomes apparent that before the "use of narcotics by an addict . . . be beyond the reach of the criminal law," there must also exist that same "irresistible urge." It is respectfully submitted that the view expressed by Mr. Justice WHITE must be read in that light. If not, the mere addict would be free to carry drugs to his and society's detriment. The facts in the case at bar belie the existence of the "irresistible urge" referred to by Mr. Justice WHITE, and just as he felt in *Powell* that "[n]either in the medical testimony nor elsewhere is there any indication that Powell had reached such a state of intoxication that he had lost the ability to comprehend what he was doing or

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* Mr. Justice MARSHALL, in the plurality opinion, rejected the trial court's findings of fact, and concluded that on the state of the record there was no showing that chronic alcoholics, and the defendant in particular, suffered from an "irresistible compulsion" to drink (392 U.S. at 535, 88 S. Ct. at 2155).

where he was," and that "Powell at the time knew precisely where he was, retained the power to stay off or leave the streets, and simply preferred to be there rather than elsewhere," and that he "showed nothing more than that he was to some degree compelled to drink . . ." (392 U.S., *supra* at 553-54, 98 S. Ct. at 1265-65), so is the State now constrained to argue that there likewise is no showing that the petitioner "had lost the ability to comprehend what he was doing or where he was," and that he "simply preferred" to enjoy the euphoria that the injection of heroin would bring him, rather than endure the "enforced abstinence" which he underwent at the time of incarceration, particularly when he served a three-month sentence (95-96); when he committed himself to Interfaith Hospital in November, 1970, after having the reasoned choice to attempt to have himself admitted on five prior occasions (102);* when he stopped using drugs for several days after his wife had requested it (134-35); and when he did not wish to join "somebody high walking down the street" because he did not feel that . . . [he] wished to join him" (133). There was also some testimony that the petitioner would be gradually veered away from drug use at the Addiction Research and Treatment Corporation methadone program (206). In

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* The question can be posed as to why the petitioner could not have *again* voluntarily committed himself to some facility or program when he knew it would be of great value to him, even if not for the primary purpose of detoxification? One would think that if he were possessed of a reasoned choice to commit himself to Interfaith Hospital during a period of "compulsion" or "craving" to ingest heroin, he would certainly have more freely wanted to seek aid from any one of the many available agencies and programs interested in his problem when he was not under stress. It seems that he chose to be indifferent!

The defendants in *Castle* v. *United States*, 347 F.2d, *supra* at 493, and *United States* v. *Freeman*, 357 F.2d, *supra* at 611, had also during the period of their addiction voluntarily committed themselves to hospitals for treatment.

addition, testimony was forthcoming that the petitioner *could* control his habit when he took methadone (120), and that when he was in jail for three months and not ill for about the latter two months of that period, he nevertheless went back to heroin only a week after being released from jail (128). And this albeit he had had none of the symptoms of withdrawal for most of the time he was in jail (128-29). If his use of narcotics was motivated by the desire to avoid such symptoms, then it would be highly inconsistent to state that the petitioner had no reasoned choice when he returned to the use of heroin at a time when the dreaded withdrawal symptoms were no longer there to plague him.

In addition, it is significant that as a witness in his own behalf, the petitioner testified as follows:

> "The Court: There are times, as you tell us, when you skin pop and there are other times when you put the narcotic into your vein
>
> The Witness: Yes.
>
> The Court: How is it that you arrive at a decision to do one or the other?
>
> The Witness: Well, I was afraid of having an overdose.
>
> The Court: You mean, it is not possible to get an overdone just skin popping?
>
> The Witness: I don't think so" (111-12).

It would appear that the caution and intelligent conduct with which the petitioner approached the use of heroin would belie any contention whatever that his compulsion to use this dangerous narcotic drug was so strong that it deprived him of rationality and thereby should vindicate him from the crimes he had committed. It would be unreasonable to state that his compulsion to use the drug was

so overwhelming as not to make him a fit subject for prosecution, on the basis of the claim made by counsel herein that the very nature of petitioner's addiction "precluded him from the avoidance of the use of drugs and the necessary implements" (Petition, p. 12). The totality of the evidence adduced at the trial of this case, particularly when we weigh the testimony of the petitioner himself, precludes any determination that "he had lost the ability to comprehend what he was doing or where he was," the rationale which is the heart of Mr. Justice WHITE'S statement in the *Powell* case. The record in the instant case, therefore, shows a person, who, in seeking oblivion by the use of heroin, took a path leading to it which was far from irrational or beyond his control.* The portrayal of the petitioner simply would make unwarranted any characterization of him as a person with a claim of such significant magnitude that this Court should be constrained to grant the writ herein sought. The history of his addiction as revealed in the record of the case might well not cast him to be the proper party capable of stimulating a justiciable issue before this Court (see 28 U.S.C.A., Section 1257, nn. 63, 64, 70, 71, 73, 92). The petitioner had not been demonstrated to be a "lost cause" at the time he was apprehended. It is this, therefore, which should effectively preclude him from any consideration of entitlement to a defense predicated upon mere drug addiction. Insofar as he is concerned, the punishment imposed upon him for the criminal acts involved was constitutionally proper and merits no review by this Court. All he is actually faced with, it is

* The petitioner does not represent the "extreme" case referred to by then Chief Judge Fuld in *People* v. *Borrero*, 19 N Y 2d 332, 335, 227 N.E. 2d 18, 20 (1967).

respectfully suggested, is a record of conviction, the stigma of which is unavoidable. See *Powell* v. *Texas*, 392 U.S., *supra* at 539, 88 S. Ct. at 2157-58; Mr. Justice BLACK affirming the defendant's conviction, in which Mr. Justice HARLAN joined, referring to drunkenness when it is labeled a "crime."

While the petitioner's professional and medical testimony is impressive, none of that testimony tends to substantiate any claim that the petitioner was so mentally impaired as a result of his drug addiction that he ought to be relieved from all responsibility of possessing narcotics and narcotic implements, the possession of which had never been disputed. Eloquent presentations concerning drug addiction and its consequences, generally, abstractly and hypothetically presented, cannot inure to the benefit of the instant petitioner since such generalities do not point up any reasons why such proffered principle of criminal absolution should be made applicable to him. To do so, would violate the principle already enunciated that drug addiction alone will not excuse one from answering for his crime, albeit that crime is concerned with the possession of drugs or implements for personal use, a theory which the petitioner advances in his petititon. In *Castle* v. *United States*, 347 F. 2d 492 (D.C. Cir. 1964), *cert. denied*, 381 U.S. 929, 953 (1965), *supra*, the court (then Circuit Judge Burger, concurring in result) refused to accept "[t]he general comments on narcotics addiction drawn from appellant's brief [which] are simply a summary of the views of some writers on the subject." (*id.* at 495). Judge Burger also added that "[n]either this court nor any other court has ever held that drug addiction is per se a form of mental disease or 'insanity' in the context of

assessing criminal responsibility (*ibid.*). The opinion of Judge Wright below indicates, also, this failure of specific proof regarding the petitioner's mental impairment by more direct testimony on the part of the "professional and medical" witnesses (Petition, Appendix C, p. C-19). Interestingly enough, Judge Wright, in referring to petitioner's expert witnesses, states that they "circle warily around, but do not quite approach, addiction as an impairment of the mind so grave as to simulate insanity" (*id.* at C-8).

It must be recognized that notwithstanding the concession of heroin addiction in this case, and the formulated definitions of a "drug addict" or "drug dependent" person, which, at times, create the aura of hopeless futility,* there are, as with alcoholics, different degrees of addiction. Thus, cures do occur for there is the "phenomenon of remission and self-abstinence" (see *United States* v. *Moore*, 486 F. 2d, *supra* at 1193; Leventhal, Cir. *J.*). If the revised New York drug laws connote that the former Narcotic Addiction Control Commission treatment is a failure (now Drug Abuse Control Commission [Section 81.07 of the Revised Mental Hygiene Law]), as petitioner alludes (Petition, n. 12 at p. 11), the failure lies primarily with the addict whose cooperation is the key as to whether *any* program will or will not be successful. As Judge Jasen has stated in the opinion below: "[P]unishment may persuade some addicts to undertake rehabilitation through various State or private programs" (Petition, Appendix A, p. A-8).

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* See *Matter of James*, 22 N Y 2d 545, 551, 240 N.E.2d 29, 32 (1968); 21 U.S.C., Section 802(1) (1970); 42 U.S.C., Section 201(g) (1970); and World Health Organization definition (Petition, n. 6 at p. 6).

Petitioner stresses the fact that at the time of his apprehension he "begged the officer to let him complete . . . [the injection which] vividly depicts, in human terms, the anguish of the addiction illness" (Petition, p. 12). This is no more proof of a showing of a "compulsive psychological drive," which Dr. Primm, one of the defense witnesses, described as "patho-pathological," and which the petitioner points out (Petition, pp. 6-7), than would be an offer of a bribe to avoid incarceration and a criminal record. If the appellant *had* to "shoot up," might he not have put up some struggle for the opportunity to do so? The record does not indicate any such struggle.

In *United States* v. *Moore*, 486 F. 2d 1139 (D.C. Cir. 1973), *supra*, Circuit Judge Leventhal, in his opinion affirming the convictions, explains the statement of Mr. Justice WHITE in *Powell*, hereinbefore referred to, in the following fashion:

> "As already noted, *Robinson* said expressly that the state could punish purchase or possession of a narcotic drug. The Court was doubtless aware that just such a possession provision is part of the Uniform Narcotic Drug Act in effect in most states.† Justices Warren and Black subscribed not only to *Robinson* but also to the opinion affirming Powell's conviction as based on an actus reus.
>
> "Justice White's statement must be read in the framework not only of his votes to uphold the convictions of both Robinson and Powell, but of his statement that punishment for an offense can be

† (Footnote in quoted material of Leventhal, Cir. J.)
"Justice Douglas, who joined in the *Robinson* opinion, added a concurrence which noted, 370 U.S. at 660, that the Uniform Act does not punish addiction."

related to the exercise of will at some previous time —at least if the willed acts were not 'remote in time.'† This indicates that punishment for the offense of possession may be justified constitutionally, notwithstanding a claim of present lack of control capacity, by reference to some not-too-remote choice of the addict to eschew rehabilitation treatment available. This is significantly different from the standard approach of *e.g.*, the insanity defense, as exemplified by the ALI rule, which focuses on lack of capacity at the time of the offense, to control the conduct.

"Also revealing of Justice White's approach is his concluding passage, 392 U.S. at 553-54, that a defense is not established by the mere existence of compulsion 'to some degree,' where the defendant has not made a showing that he was 'unable' to avoid the condition made criminal.†† There is a

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† (Footnote in quoted material of Leventhal, Cir. J.)

"Justice White said, 392 U.S. at 550-51 note 2:

> By precluding criminal conviction for such a 'status' [narcotic addiction] the Court [in *Robinson*] was dealing with a condition brought about by acts remote in time from the application of the criminal sanctions contemplated, a condition which was relatively permanent in duration, and a condition of great magnitude and significance in terms of human behavior and values. . . . If it were necessary to distinguish between 'acts' and 'conditions' for purposes of the Eighth Amendment, I would adhere to the concept of 'condition' implicit in the opinion in *Robinson*. . . . The proper subject of inquiry is whether volitional acts brought about the 'condition' and whether those acts are sufficiently proximate to the 'condition' for it to be permissible to impose penal sanctions on the 'condition.' "

†† (Footnote in quoted material of Leventhal, Cir. J.)

> "Justice White upheld the conviction of Powell, even assuming he 'established that he could not have resisted becoming drunk on December 19, 1966.' '. . . Powell showed nothing more than that he was to some degree compelled to drink and that he was drunk at the time of his arrest. He made no showing that he was unable to stay off the streets on the night in question.' 392 U.S. at 553-54."

plain implication that defendant would have the burden of proof.

"Taking Justice White's opinion and votes as a whole, we conclude that his approach does not undercut Justice Marshall's opinion on the constitutional permissibility of holding even narcotic addicts for the intentional action of possession, without recognition of a new defense of psychological dependence that poses difficult problems of verifiability and widespread use. To the extent that those contending for a dependence defense are ready to accept convictions under state statutes, without provision for such a defense, their submission plainly lacks constitutional requirement, even though it may be permeated with constitutional discussion." (*Id.* at 1197-98.)

To interdict the possession of narcotics by a narcotic addict while at the same time not criminally punishing him for his "status," is not as irreconcilable as it may appear at first blush. Did not *Stanley* v. *Georgia*, 394 U.S. 557, 89 S. Ct. 1243 (1969), in the majority opinion, hold an obscenity statute in Georgia unconstitutional as violating the First and Fourteenth Amendments for imposing criminal sanctions upon the mere knowing possession by an individual of obscene matter in the privacy of his home even though "the States retain broad power to regulate obscenity" (*id.* at 568)? Yet, in *United States* v. *Thirty Seven* (37) *Photographs*, 402 U.S. 363 (1971) 91 S. Ct. 1400, *rehearing denied*, 403 U.S. 924, 91 S. Ct. 2221 (1971), the Court held that "[t]he trial court erred in reading *Stanley* as immunizing from seizure obscene materials possessed at a port of entry for the purpose of importation for private use" (*id.* at 376). And it is interesting to note

that it was Mr. Justice WHITE who announced the judgment of the Court in an opinion in which Mr. Chief Justice BURGER and Mr. Justices BRENNAN and BLACKMUN joined,* upon whose statement in *Powell* v. *Texas*, 392 U.S., *supra*, at 548-49, 88 S. Ct. at 2162, the petitioner now so strongly relies (Petition, p. 9).

Notwithstanding the holding in *Robinson* v. *California*, 370 U.S. 660, 82 S. Ct. 1417 (1962), that case did not announce that narcotic addiction is a mental illness in any context of criminal responsibility, and expressly reserved the right of a "State . . . to impose criminal sanctions . . . against the unauthorized . . . possession of narcotics within its borders," and that "the range of valid choice which a State might make in this area is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide" (370 U.S., *supra* at 664-65), 82 S. Ct. at 1419-20; Mr. Justice STEWART expressing the views of five members of the Court).

Likewise, it is also significant that in *Powell* v. *Texas*, *supra*, in the prevailing opinion of Mr. Justice MARSHALL, it was announced that the "entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed *some act*, has engaged in some behavior which society has an interest in preventing, or perhaps in historic common law terms, has committed some *actus reus*" (392 U.S., at 533, 88 S. Ct. at 2154-55; emphasis supplied) . And the State of New York also deems it worthwhile to point out the cogent language of Mr.

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* Mr. Justice STEWART and HARLAN also joined in Part I of the opinion which is not pertinent herein.

Justice BLACK in the *Powell* case, who, in the concurring opinion, with whom Mr. Justice HARLAN joined, stated:

> ". . . To adopt [the position taken by the petitioner herein] would significantly limit the States in their efforts to deal with a widespread and important social problem and would do so by announcing a revolutionary doctrine of constitutional law that would also tightly restrict state power to deal with a wide variety of other harmful conduct.
>
> "Those who favor holding that public drunkenness cannot be made a crime rely to a large extent on their own notions of the wisdom of such a change in the law. A great deal of medical and sociological data is cited to us in support of this change. Stress is put upon the fact that medical authorities consider alcoholism a disease and have urged a variety of medical approaches to treating it. It is pointed out that a high percentage of all arrests in America are for the crime of public drunkenness and that the enforcement of these laws constitutes a tremendous burden on the police. Then it is urged that there is no basis whatever for claiming that to jail chronic alcoholics can be a deterrent or a means of treatment; on the contrary, jail has, in the expert judgment of these scientists, a destructive effect. All in all, these arguments read more like a highly technical medical critique than an argument for deciding a question of constitutional law one way or another.
>
> "*Of course, the desirability of this Texas statute should be irrelevant in a court charged with the duty of interpretation rather than legislation, and that should be the end of the matter.* But since proponents of this grave constitutional change insist on offering their pronouncements on these questions of medical diagnosis and social policy, I am compelled to add that, should we follow their argu-

ments, *the Court would be venturing far beyond the realm of problems for which we are in a position to know what we are talking about.* [392 U.S. at 537-38; 88 S. Ct. at 2156-57; emphasis supplied.]

* * * * *

"Apart from the value of jail as a form of treatment, jail serves other traditional functions of the criminal law. For one thing, it gets the alcoholics off the street, where they may cause harm in a number of ways to a number of people, and isolation of the dangerous has always been considered an important function of the criminal law. In addition, punishment of chronic alcoholics can serve several deterrent functions—it can give potential alcoholics an additional incentive to control their drinking, and it may, even in the case of the chronic alcoholic, strengthen his incentive to control the frequency and location of his drinking experiences. [392 U.S. at 539, 88 S. Ct. at 2157.]

* * * * *

"Even the medical authorities stress the need for continued experimentation with a variety of approaches. I cannot say that the States should be totally barred from one avenue of experimentation, the criminal process, in attempting to find a means to cope with this difficult social problem. From what I have been able to learn about the subject, it seems to me that the present use of criminal sanctions might possibly be unwise, but I am by no means convinced that *any* use of criminal sanctions would inevitably be unwise or, above all, that I am qualified in this area to know what is legislatively wise and what is legislatively unwise." (392 U.S. at 539-40; 88 S. Ct. at 2158; emphasis in original.)

It is also interesting to note other language of Mr. Justice BLACK in *Powell* v. *Texas, supra.* For instance, he also went on to say:

"But even if we were to limit any holding in this field to 'compulsions' that are 'symptomatic' of a 'disease,' in the words of the findings of the trial court, the sweep of that holding would still be startling. Such a ruling would make it clear beyond any doubt that a narcotics addict could not be punished for 'being' in possession of drugs or, for that matter, for 'being' guilty of using them. A wide variety of sex offenders would be immune from punishment if they could show that their conduct was not voluntary but part of the pattern of a disease. More generally speaking, a form of the insanity defense would be made a constitutional requirement throughout the Nation, should the Court now hold it cruel and unusual to punish a person afflicted with *any* mental disease whenever his conduct was part of the pattern of his disease and occasioned by a compulsion symptomatic of the disease. Such a holding would appear to overrule *Leland* v. *Oregon*, 343 U.S. 790 (1952), where the majority opinion and the dissenting opinion in which I joined both stressed the indefensibility of imposing on the States any particular test of criminal responsibility. *Id.*, at 800-801; *id.*, at 803 (Frankfurter, *J.*, dissenting).

"The impact of the holding urged upon us would, of course, be greatest in those States which have until now refused to accept any qualifications to the 'right from wrong' test of insanity; apparently at least 30 States fall into this category. But even in States which have recognized insanity defenses similar to the proposed new constitutional rule, or where comparable defenses could be presented in terms of the requirement of a guilty mind (*mens rea*), the proposed new constitutional rule would be devastating, for constitutional questions would be raised by every state effort to regulate the admissibility of evi-

> dence relating to 'disease' and 'compulsion,' and by every state attempt to explain these concepts in instructions to the jury. The test urged would make it necessary to determine, not only what constitutes a 'disease,' but also what is the 'pattern' of the disease, what 'conditions' are 'part' of the pattern, what parts of this pattern result from a 'compulsion,' and finally which of these compulsions are 'symptomatic' of the disease. The resulting confusion and uncertainty could easily surpass that experienced by the District of Columbia Circuit in attempting to give content to its similar, though somewhat less complicated, test of insanity [footnote omitted]. The range of problems created would seem totally beyond our capacity to settle at all, much less to settle wisely, and even the attempt to define these terms and thus *to impose constitutional and doctrinal rigidity seems absurd in an area where our understanding is even today so incomplete.*" (392 U.S. at 545-46, 88 S. Ct. at 2160-61; emphasis supplied.)

Judge Jasen, in the opinion of the New York Court of Appeals below, Chief Judge Fuld taking no part, emphasizes the "utility of . . . [criminal] penalties to law enforcement," and points out that "strong reasons of public policy militate against any such recognition [of the drug-dependence defense] by this court" (Petition, Appendix A, pp. A-8 to A-9). He also stresses that "[r]easons of policy and power . . . dictate that we move with caution and restraint in adjudicating defendant's claim of cruel and unusual punishment with its attendant logical implications for a constitutionality required minimum standard for criminal responsibility" (Petition, Appendix A, p. A-8). Further liberalization of this State's criminal-accountability statute

for mere addiction would be an unwise approach in an area so geographically beset with problems as is drug abuse. The New York State Legislature has only recently enacted new legislation in the field of Drug Abuse and Narcotic Addiction (Article 81 of the Revised Mental Hygiene Law, L. 1972, c. 251, eff. Jan. 1, 1973), after lengthy and deliberate study of the pros and cons regarding the feasibility of such enactment, so that no argument can now validly be urged that there is extant antiquated legislation which requires new consideration and updating in our changing society.

To immunize a person who "cops out" from the realities of life without a showing that his mental capacity was so impaired as to destroy the voluntary nature of his act, would be to derogate accepted legal concepts regarding criminal responsibility. In *People* v. *Trapp*, 20 N Y 2d 613, 233 N.E.2d 110 (1967), it was stated as follows:

> ". . . Doubtless at times compliance with the law results in personal inconvenience and hardship; yet, whatever bearing this may have on the nature of the punishment, it can have no bearing on the power of the Legislature to define criminal responsibility. (See, e.g., *People* v. *Borrero*, 19 N Y 2d 332.)" (20 N Y 2d at 617, 233 N. E. 2d at 112-13.)

This "personal inconvenience and hardship" which results from the requirement that a drug addict comply with the law interdicting the illicit possession of narcotics and narcotic paraphernalia, while addicted to a most dangerous habit, is not sufficient for the trier of the facts upon which to predicate any valid determination which would excuse the addict for the commission of those crimes or of *any* crime (induced by his need for narcotics) for

which he is arrested, if his addiction fails to reach the level of mental incompetency required by Section 30.05 of the New York Penal Law, *supra*. And this is so although the crime may either involve the contraband which is necessarily required to feed his habit, or the wrongful acquisition of the wherewithal which will subsequently be needed for the purchase of the forbidden fruit. The trier of the facts cannot be left to conjecture, and as so eloquently advanced by the trial judge below: "Any speculation indulged by the court in the area of possible mental incapacity on the part of a defendant who forswears all claim to insanity as a defense, would breach the permissible limits of the inferential process and build an inference upon an inference, a hornbook tabu" (Petition, Appendix C, p. C-13).

In fine, it is respectfully urged that this Court should deny the petitioner's application for a writ of certiorari upon the ground that the issue is moot (ARGUMENT A, *supra*), and upon the further ground (ARGUMENT B, *supra*) that the claim advanced by the petitioner is legally unsound and will only inevitably open the door to the presentation of a myriad of related contentions in the drug-abuse area, as well as in the more remote spheres of "compulsions" not, in and of themselves, protected beneath the panoply of New York's present liberal and equitably constituted statute regarding criminal responsibility. By seeking such absolution in the eyes of the criminal law, there will be, in effect, a serious challenge to this State's obligation to safeguard public policy requirements.

CONCLUSION

The petition for the writ of certiorari should be denied.

Dated: Brooklyn, New York
March, 1974

Respectfully submitted,

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APPENDIX

APPENDIX A

Excerpts from Rosenblatt, New York's New Drug Laws and Sentencing Statutes, Law Journal Press, N. Y., pp. 104-07, with comments by the author of this brief.

"SECTION 56.

ELEVATING THE DEGREE OF CRIME BY VIRTUE OF PRIOR CONVICTION: APPLICATION TO CRIMES COMMITTED PRIOR TO THE ENACTMENT OF THE STATUTE

As we have seen, there are several situations in which previous convictions will serve to elevate the degree of a controlled substance crime.

(a) By virtue of PL 220.12, fifth degree possession (C felony) under PL 220.09(1)-(9) is elevated to fourth degree possession (B felony) upon a previous conviction under PL 220.09(1)-(9). See Sec. 51 supra.

(b) By virtue of PL 220.37, a fifth degree sale (C felony) under PL 220.34(1)(a) or (b) is elevated to fourth degree sale (B felony) upon a previous conviction under PL 220.34(1)(a) or (b). See Sec. 52 supra.

(c) By virtue of PL 220.34(2), any sixth degree sale (D felony) is elevated to fifth degree sale (C felony) upon a previous conviction for any sixth degree sale. See Sec. 54 supra.

(d) The sale of any amount of hallucinogen, hallucinogenic substance, stimulant, or LSD (PL 220.31), a class D felony, is, under PL 220.39(2) elevated to third degree sale (Class AIII felony) upon any previous article 220 conviction, or attempts or conspiracies thereof. See Sec. 53 supra.

(e) Possession with intent to sell any amount of hallucinogen, hallucinogenic substance, stimulant, or LSD, ordinarily a class D felony, is, by virtue of PL 220.16(2), a class AIII felony, if preceded by an article 220 conviction or conspiracy or attempt thereof. See Sec. 55 supra.

There is also the matter of augmented sentences upon predicate felony convictions. All of these issues involve varying principles of law relative to prospective or retroactive application.

In the case of category (a) above, the enlargement of criminal responsibility is specifically made to depend on the previous commission of *designated* crimes. For example, a PL 220.09 did not exist prior to September 1, 1973, it is at felony upon a previous violation of *that* section. Because PL 220.09 did not exist prior to September 1, 1973, it is at least arguable that the statute could not be invoked retrospectively. Suppose, for example, that in December of 1973 a defendant was arrested for possession of heroin, under PL 220.09(1). His record disclosed a previous conviction, in 1968, for felonious possession of heroin under former PL 220.15(2)(b)(i). Even though the 1968 conviction was for the very act now condemned under PL 220.09(1), his previous conviction was not under that section, but under a statute, since repealed,* which proscribed the identical conduct. *The Court of Appeals has displayed a*

* [Footnote not in original.] It must be emphasized that in the case at bar, the petitioner had been convicted of Criminal possession of a dangerous drug in the sixth degree (former Section 220.05 of New York's Penal Law, also *since repealed* by New York Session Laws 1973, Chapter 276, Section 18, effective September 1, 1973).

strong proclivity for giving recidivist statutes the narrowest reading possible [e.g. *People ex rel. Newman* v. *Foster*, 297 N.Y. 27 (1947); *People* v. *Shaw*, 1 N.Y.2d 30 (1956)], and if the application of that doctrine persists, PL 220.12 may prove inoperable in case of convictions rendered under precursor statutes to PL 220.09(1)-(9). [Immediately preceding emphasis not in original.]

In the case of PL 220.37, predicates count only if they involve violations of PL 220.34(1)(a), to wit, selling a narcotic preparation; or of PL 220.34(1)(b), to wit, selling more than ten ounces of a dangerous depressant or two pounds or more of a depressant. Here the application of the statute to convictions rendered under precursor statutes *is further confounded* by the fact that narcotic preparations were not so designated prior to September 1, 1973, even though the substances now called narcotic preparations were declared illicit, and even though they were known as narcotic drugs [former PL 220.00(4), L.1972, ch. 878, see schedule III(b) and III(c) of former Penal Law Sec. 220.02], which correspond exactly to Schedule III(b) and III(c) under present Public Health Law Sec. 3306. *In the case of narcotic preparations, therefore, there are two possible barriers to the applicability of PL 220.37; the first numerical, and the second terminological.* [Emphasis not in original.]

Under paragraph (c) above, PL 220.34(2) is described as elevating sixth degree controlled substances sales to fifth degree sales, when they are preceded by sixth degree sale convictions. If, for example, a defendant is convicted on August 30, 1973 under former PL 220.30 (L. 1969, ch.

787) for selling LSD, a class D felony, and is then arrested on September 10, 1973 for selling LSD in violation of PL 220.31, *an issue would arise* whether the 1973 sale would invoke the terms of PL 220.34(2), rendering it a class C rather than class D felony. The defendant would point out that the crime is elevated only if he has "been previously convicted of criminal sale of a controlled substance in the sixth degree" and that his August 30, 1973 conviction was for a crime that would now be a sixth degree sale, but was then fourth degree sale of a dangerous drug. [Emphasis not in original.]

In paragraph (d), the operability of PL section 220.39 (2) is not written in new terminology where previous convictions are concerned. The statute (L. 1973, ch. 1051, Sec. 14) renders the sale of enumerated controlled substances a class AIII felony when the defendant "has previously been convicted of an offense defined in Article 220 or the attempt or conspiracy to commit any such offense." Here the language is decidedly different from that used in the previous case. If the LSD defendant under PL 220.34(2) is successful in arguing that the statute does not apply because it defines a "new" crime, the same argument would lead to the opposite conclusion in the case of PL 220.39(2). There the legislature refrained from defining the predicates as "controlled substance" crimes under new sections, but instead referred to an Article 220 which has been with us since 1967. It would seem likely, then, that PL Section 220.39(2) would become operative in any case where the defendant had any article 220 conviction covering the period from the inception of the revised Penal Law, on September 1, 1967,

forward. To apply the statute to the same violations when committed as old Penal Law 1751 *et seq.* crimes, would be to stretch it beyond its intended scope."

COMMENTS BY THE AUTHOR OF THIS BRIEF

Since one of the crimes for which the petitioner was convicted, Criminal possession of a dangerous drug in the sixth degree (former Section 220.05 of New York's Penal Law), was repealed, effective September 1, 1973, might it not also be considered a stretching "beyond its intended scope" if such crime were employed as a predicate for raising the grade of a drug-related offense committed after the effective date of new Article 220, and for which a conviction followed?

Although the author of this brief concedes that three statutes in the former Article 220 of New York's Penal Law have remained intact and were incorporated into the newly enacted Article 220 (Section 220.45 [Criminally possessing a hypodermic instrument], Section 220.50 [Criminally using drug paraphernalia in the second degree] and Section 220.55 [Criminally using drug paraphernalia in the first degree]), one of which, the one concerned with the hypodermic instrument, the petitioner also stands convicted, it is respectfully urged that such fact might not legally bolster any contention that such prior conviction would serve as a predicate in the event that the petitioner is convicted in the future for violating either Section 220.16 (2) or Section 220.39 (2) of New York's Penal Law, so as to overcome the strong presumption that a law is to have prospective application only in the absence of a clearly

manifested legislative intent to the contrary. It might well be deemed a strange interpretation indeed to apply the petitioner's two *misdemeanors* now before this Court, for which convictions were found prior to September 1, 1973, as predicates for elevating the degree of a drug-related crime committed after that date, without the New York Legislature also unequivocally intending to apply the same theory of elevating the grade of the subsequent charge and conviction of a related crime based upon *more* serious drug felonies where convictions were also obtained at such prior date. It has been demonstrated from the excerpts from Mr. Rosenblatt's book set forth in this Appendix, that doubts do exist with regard to such prior felonies, thereby bringing into prominence the strong presumption of prospectiveness (see pp. 18-19, *supra*). That being so, it might be considered by an appellate court in the future that applying the two misdemeanors for which the petitioner was convicted prior to September 1, 1973 as predicates for raising the grade of the subsequent drug crime, would be without any justifiable basis since there is nothing peculiar about those crimes which should accord them any different treatment from felonies. A more severe interpretation with regard to prior misdemeanor convictions might not be acceptable from an equitable point of view, a view which would not denigrate the recent "hard-line" approach by the New York State Legislature in its desirable quest to overcome the serious drug problem, at the time of the enactment of the new Article 220 of the Penal Law in 1973. Of course, where the legislative intent is clear, as in the recidivist sentencing provisions found in Section 70.06 of New York's Penal Law (second *felony* offender) and Section

70.10 of New York's Penal Law (persistent *felony* offender), with which we are not presently concerned, since misdemeanors are involved, no doubts as to retroactivity are present.

However, if any court having jurisdiction in New York State were constrained to urge that a statute such as Section 220.55 of New York's Penal Law (Criminally using drug paraphernalia in the first degree), which, like Section 220.45 of New York's Penal Law (Criminally possessing a hypodermic instrument), existed prior to September 1, 1973, and was also incorporated into the newly enacted Article 220, could be construed from its language to be applicable to a similar conviction arising *prior* to that date, some logic might well be asserted for such a holding. Section 220.55, *supra*, notwithstanding its misleading title, was designed "to cope with the problems of proof which result from raids on illicit drug 'factories.' Often such a raid fails to turn up any narcotics either because the latest batch was just processed and shipped out or because the next batch has not yet arrived for processing. However, from the equipment in the place it is obvious that narcotics for eventual street sale are being processed there . . . [The statute] makes criminal the knowing possession or sale of certain ordinarily legitimate materials under the indicated illegal circumstances" (Practice Commentary, Arnold Hechtman, McKinney's Consolidated Laws of New York Annotated, Book 39, Penal Law, 1973-1974, Cumulative Annual Pocket Part, at pp. 29-30). It is beyond cavil that a crime such as expressed in this particular statute can be categorized as anomalous in nature and *sui generis* since

it differs from the classic sale or possession of narcotics, so that any application of Section 220.55 of New York's Penal Law to a conviction under its companion statute, Section 220.50 of the Penal Law, arising prior to September 1, 1973, might well be deemed to have no bearing on the other sections within the new Article 220, and without in any wise offending the presumption of prospectiveness.